themselves to be updated to implement Section 614, the Commission need not and should not update the rankings.

The Commission might wish to update the list, however, to add new designated communities to the current list for stations which have gone on the air since the list was last revised. If, for some reason, the Commission decides that the list must be updated to change the rankings, this should be done as infrequently as possible and the Commission should make it clear that the changes are not intended to have copyright implications. The U.S. Copyright Office would be the appropriate body to ascertain the copyright implications of any such change in FCC rules.

In paragraph 23 of the NPRM, the Commission raises the issue of the effect of broadcast market designation or Section 76.51 changes on the syndicated exclusivity and non-duplication rules. Changes in Section 76.51 rankings would affect the extent of non-duplication protection if a broadcast market moved on or off the major market list. Section 76.92 of the rules provides an expanded 20 mile protection zone for smaller market television stations. A change in broadcast market rank could not only increase or decrease a cable system's non-duplication obligations, but it could seriously reduce the value of syndex or nonduplication protection to a station which had bargained for exclusivity based on a 55 mile zone and who now can only enforce such exclusivity based on a 35 mile zone.

These are yet additional reasons to resist changing the broadcast market list.

Time Warner submits that local commercial stations which invoke must-carry status, whether as an ADI station or pursuant to a special relief petition, should be entitled to assert syndicated exclusivity and network non-duplication protection only against non-local commercial stations. Section 615 adopts this policy for NCE stations.[35] Although not dealt with in Section 614, Time Warner submits that the policy is equally applicable to commercial stations. On the other hand, local commercial stations which elect retransmission consent should not be eligible to invoke the syndicated exclusivity and non-duplication rules. When such stations elect to pursue free market negotiations, they can negotiate for such protection as one of the conditions of their consent. The ability to engage in marketplace negotiations should obviate the need for governmental regulatory protection. Conversely, if retransmission consent is not granted, a station which is not carried should not be able to deprive the public of programming from other stations. If a local station desires the benefits of the regulatory protection contained in the Commission's rules, it should elect must-carry status.

5. Selection of Signals.

Time Warner disagrees with the Commission's proposal in paragraph 26 to adopt a definition of "network" which is

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[35]Section 615(f).

identical to the concept of "substantial duplication." Congress used two separate terms and they should be defined separately. An example of how a single definition can produce the wrong result best illustrates this point. If a cable system is carrying both an NBC affiliate and an ABC affiliate as "must-carries," the system might also be required to carry an NBC/ABC "cherry picker" because the cherry picker may not "substantially duplicate" either of the full affiliates. However, the cherry picker clearly duplicates what the system is already carrying on the two affiliates and should not have to be carried. Thus, Time Warner strongly urges the Commission to adopt separate definitions for "network" and "substantial duplication."

For "network," Time Warner suggests that the definition of a network affiliate should be any station which has entered into an affiliation arrangement for the receipt of programming from an entity meeting the definition in Section 73.662(i) of the Commission's rules in effect on October 6, 1992. Such a definition would comport with the common usage, everyday understanding of the term "network" to apply (at least presently) only to ABC, CBS, NBC and FOX.[36] By declining to include a definition of "network" in the 1992 Act, Congress obviously intended the ordinary meaning to apply. Moreover, the proposed definition would be consistent with the traditional network definition applied by the Commission in the

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[36]See Fox Broadcasting Co., 5 FCC Rcd 3211 (1990).

context of cable/broadcast carriage matters.[37] As to "substantial duplication," Time Warner suggests the definition which was advanced above for NCE stations, i.e., 14 or more prime time hours per week, whether or not simultaneous. The reason that non-simultaneous programming must be considered duplicative is that under the syndicated exclusivity and network non-duplication rules, non-simultaneous programming is considered to be "duplicative" and cable operators must black out such programming upon request.[38]

As for carriage of low power television stations, the statutory criteria contained in Section 614(h)(2) defining qualified LPTV stations do not require further regulatory embellishment by the Commission.

Finally, paragraph 31 deals with sales presentations and program length commercials. Time Warner takes no issue with the proposed interim definition of a home shopping station. However, the question of what constitutes a "program length commercial" or a "sales presentation" is not dealt with in the proposed interim definition. Time Warner suggests that at least during the interim period while the Commission is conducting a rulemaking on this issue, the good faith determination of a cable operator should be controlling. In grappling with these definitions, the Commission might wish to consider the definition of commercial matter used in its

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[37] See 47 C.F.R. Section 76.4(l)(1972).

[38] 47 C.F.R. §§76.92(a), 76.151.

children's advertising rules. Section 76.225, note 1 defines commercial matter as "airtime used for the offering of goods or services for sale."[39]

C. **Manner of Carriage.**

1. Content to be Carried.

The Act requires the carriage of program-related material in the vertical blanking interval or on subcarriers "to the extent technically feasible."[40] Time Warner suggests that, at a minimum, this provision does not require the cable operator to incur additional costs or to change or add equipment in order to carry such material. For example, program-related material may be mixed in with other materials. If the program-related material is not easily and automatically separable from the non-program related material, carriage of the VBI or subcarrier should be considered not technically feasible.[41]

As to the issue of when material transmitted on the vertical blanking interval or on subcarriers is "program-related," Time Warner concurs with the Commission's suggestion that the test used for copyright purposes is appropriate.[42]

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[39]47 C.F.R. § 76.225.

[40]Section 614(b)(3)(A), 615(g)(1).

[41]Such separation can be accomplished by segregating the included material on a specified VBI line and placing the excluded material on other lines. The lines for the included material would be specified in advance and never contain excluded material. Alternatively, well specified digital data headers could precede included material and well specified trailers could follow.

[42]NPRM at ¶32, n.42.

Under that test, material would be considered program-related if it "is intended to be seen by the same viewers as are watching the [particular program], during the same interval of time in which that [program] is broadcast, and as an integral part of the . . . program."[43] Thus, for example, subtitles in a different language of the program itself would be related, but a listing of upcoming programs on the station would not, even if the particular program is listed incidentally. Time Warner would add to this definition an exclusion for material, though arguably program-related, which is offered for sale to viewers, such as supplementary data, answers to homework problems, etc. Must-carry material should be limited to that which is freely available to all viewers.

Section 615(g)(1), in requiring carriage of program-related material in the VBI or on subcarriers on NCE stations, to the extent technically possible, adds the descriptive language regarding program-related material "that may be necessary for receipt of programming by handicapped persons or for educational or language purposes." This additional language should be read as explaining what program-related means in an educational context, not as expanding the meaning of program-related for NCE stations.

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[43]WGN Continental Broadcasting Co. v. United Video, Inc., 693 F.2d 622, 626 (7th Cir. 1982).

2. Channel Positioning.

With regard to channel positioning, the Act offers three possible options for commercial signals, that is, the station's actual over-the-air channel number, the cable channel on which the station was carried on July 19, 1985, or the cable channel on which the station was carried on January 1, 1992.[44] In the case of NCE stations, the options are the station's over-the-air channel number, or the cable channel on which the station was carried on July 19, 1985.[45] In both cases, the Act also allows the cable system and broadcast station to mutually agree upon a channel position.

Time Warner agrees that when a station elects to assert channel positioning rights, the cable system should be permitted to follow a priority structure.[46] To hold otherwise would create a confusing and often chaotic situation for many cable systems because many local television stations which are presently being carried will continue to be carried under the new regime. These stations' present channel positions are often the result of negotiation and agreement. In such cases, a local station's existing channel position should be the first priority. Another station seeking the same channel position should not be able to displace the incumbent station. Otherwise, a station's over-the-air channel number should

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[44]Section 614(b)(6).

[45]Section 615(g)(5).

[46]NPRM at ¶33.

receive the first priority, followed by its January 1, 1992, channel position in the case of commercial stations, and the July 19, 1985 channel position for NCE stations.

Such a priority system should have a number of caveats. A station should not be able to require a cable system to carry it on a channel number which is not offered as part of a basic tier, e.g., in the case of most UHF channels. As the Commission correctly notes, Congress intended that cable systems establish pared-down and inexpensive basic tiers, and this is incompatible with carriage of a high-number UHF station on-channel. There are many reasons why this is often true. For example, the basic tier's limited number of channels may not go up to a UHF station's channel number, the technical configuration of a system might require expensive trapping or trapping adjustments at each subscriber's premises, or converter boxes might have to be supplied to subscribers not having cable-compatible television sets.

Moreover, a broadcaster's channel positioning request should not be deemed to require a cable operator to violate a contrary requirement in a local franchise agreement. Similarly, channel positioning considerations should be secondary to signal quality issues. For example, cable operators should be under no obligation to carry a station on-channel if direct pick-up interference is a problem. In addition, stations should not be allowed to force the cable operator to carry it on different channels on the same

technically integrated system, for the reasons set forth above relating to the multiple ADI problem. Finally, once a station has chosen and been given a particular channel position, it should not be able to change its election unless by mutual agreement with the cable operator.

3. Signal Quality.

The signal quality standards recently adopted by the Commission clearly satisfy the requirements of Section 614(b)(4)(A).[47] Moreover, the cable operator should not be held accountable if the broadcast signal quality as received at the system's headend is inferior, for example, to a cable network signal received via satellite. As long as local television stations are carried without material degradation caused by the cable operator, the statute is satisfied.

Paragraph 36 of the NPRM raises a separate but related issue, namely, the exemption from must-carry obligations if a signal of "good quality or a baseband video signal" is not delivered to a cable system's principal headend. A signal level standard is set out in the Act for commercial stations and is left to the Commission to decide for non-commercial stations.[48] Time Warner submits that the commercial station

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[47]Report and Order in MM Docket Nos. 91-169 and 85-38, 7 FCC Rcd 2021 (1992), reconsideration, Memorandum Opinion and Order, FCC 92-508, released November 24, 1992.

[48]Pursuant to Section 614(h)(1)(B)(iii), a commercial UHF station must deliver a signal level of -45dBm and a VHF station must deliver a signal level of -49dBm. Section 615(g)(4) directs the Commission to define a good quality signal for NCE stations.

standard should be adopted across-the-board. Adoption of different standards would clearly be arbitrary, since the quality of a station's signal does not differ from a technical standpoint based upon the format or content of the station's programming.

The standard set forth in the Act is a signal strength measurement, but the Act also calls for a "good quality" signal to be delivered. Indeed, a signal can meet the strength standard and yet be virtually unwatchable, thus not of "good quality," e.g., as a result of bad ghosting, excessive noise, or electrical interference, for reasons wholly beyond the control of the cable operator. Moreover, the Act does not address where at the headend measurements should be taken, how a signal is to be measured, or when the signal must be measured. As to the quality issue, Time Warner submits that the Commission's cable technical standards provide a proper benchmark. A Television Allocation Study Organization ("TASO") Grade 2 picture should be receivable at the system's principal headend, i.e., a television picture with a visual signal level to undesired noise ratio of at least 43 dB.[49]

Time Warner submits that a good quality signal must be available on a year-round basis. There are many factors which can affect the quality of a signal, e.g., the time of year, the weather, and the quality of maintenance of the broadcast station. The Commission should adopt test procedures to

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[49] 47 C.F.R. §605(a)(7)(iii).

measure signal quality at the principal headend such that a station's signal meets signal quality standards on a continual basis. If the station does not meet these standards on a regular basis, then the provision in the Act for both commercial and NCE stations should be triggered, namely, if the station wishes to maintain must-carry status, it must bear the expense of delivering a good quality signal to the cable system's principal headend.

The Commission should clarify that broadcast stations that are presently carried and which assert must-carry rights under the Act need not be carried unless a good quality signal is received at the system's principal headend. Likewise, the Commission should clarify that signal carriage agreements entered into after July 1, 1990, but before the effective date of the Act, are not automatically preempted and need not be renegotiated. Indeed, the Commission should encourage the private resolution of signal carriage disputes so as to minimize its administrative burden.

D. **Procedural Requirements.**

With regard to notification of the deletion or repositioning of channels, the Act does not require the FCC to mandate notification to subscribers for the deletion or channel repositioning of commercial must-carry stations. Congress left this to the discretion of franchising authorities.[50]

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[50]See Pub.L. No. 102-385, 106 Stat. 1460, at §16(c)(1992), to be codified at 47 U.S.C. §544.

The provisions of the Act which require compensation to cable operators for the added copyright payments necessitated by complying with the must-carry regulations clearly provide that stations must compensate cable systems for such copyright payments regardless of whether the station is already being carried. It makes no sense to require a cable operator to drop a station merely to invoke the copyright indemnity requirement.

The Commission should clarify that the indemnity for copyright payments can be satisfied where the "distant" commercial station seeking must-carry and the cable operator mutually agree to the carriage of a local translator in lieu of the parent. A cable system should be permitted, though not required, to carry a translator in lieu of the parent station either to satisfy signal quality requirements or to satisfy the copyright indemnification provisions, assuming that there is agreement between the parent station and the cable system. Indeed, if such an agreement between the parent station and the cable system exists, the translator should be allowed to satisfy a must-carry requirement even if the parent's signal also reaches the principal headend with a grade B signal, for example, if the translator happens to supply a better quality signal. However, in no instance should a cable system be required to carry both a translator and its parent station. Such a requirement would serve no purpose.

As to complaints and compliance, the Commission should utilize the procedures in Section 76.7 of its rules. The

Commission must give cable operators at least 30 days to respond to an NCE station's must-carry complaint. Ten days is an inadequate amount of time to respond to a complaint when it has not been preceded by a notification of an alleged violation, as is required for commercial stations.

Similarly, there should be a time limit for filing a complaint when a cable system gives notice of dropping or repositioning the signal or refuses a carriage request. The Commission should give all television stations, NCE and commercial, 120 days to file a complaint in such situations. Given that Congress requires the Commission to resolve carriage disputes within 120 days, this is also a reasonable limitations period for the filing of complaints.[51]

Local commercial television stations which are not being carried and which fail to assert must-carry rights prior to the May 1 election deadline should have to wait until the next three year window.

II. RETRANSMISSION CONSENT.

A. **Applicability.**

The NPRM raises several issues concerning the applicability of the retransmission requirement imposed by Section 6 of the 1992 Cable Act.[52] Time Warner addresses three of these issues. The Commission first asks whether the

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[51]See Sections 614(d)(3), 615(j)(3).

[52]Section 6 of the 1992 Cable Act adds a new subsection (b) to Section 325 of the Communications Act of 1934.

definition of "multichannel video programming distributor," to whom the retransmission consent requirements of the statute apply, should be read to include SMATV and MATV systems. Second, the Commission asks commenters to address whether any distinctions in the matter of applying the retransmission consent provisions are warranted based on whether the entity involved is covered or not covered by the compulsory copyright licensing provisions of the Copyright Act. Third, the Commission requests comment on its tentative conclusion that the retransmission consent provisions of the statute apply only to television broadcast stations rather than broadcast stations generally.

1. Applicability to SMATV and MATV.

The 1992 Cable Act defines the term "multichannel video programming distributor" broadly to include "a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming."[53] Although SMATV and MATV systems are not specifically delineated in the list of examples contained in the definition, the statutory language is clear that the definition of a multichannel video programming distributor is not limited to the examples given and

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[53]Section 2(c)(6) of the 1992 Cable Act adds a new definition of a "multichannel video programming distributor" to Section 602 of the Communications Act of 1934.

encompasses any person who makes available multiple channels of video programming for sale to subscribers. Indeed, the legislative history makes clear that the term "multichannel video programming distributor" was to be interpreted broadly, especially with respect to the retransmission consent requirement, stating that:

> The Committee believes, based on the legislative history of this provision, that Congress' intent was to allow broadcasters to control the use of their signals by anyone engaged in retransmission by whatever means.[54]

Significantly, the statute does not require a separate charge to be imposed for broadcast retransmission service in order for the retransmission consent requirement to apply. As long as all three elements of the statutory definition are met, i.e., the entity: (1) makes available multiple channels of video programming (broadcast, non-broadcast or both); (2) for purchase; (3) by subscribers or customers, that entity qualifies as a multichannel video programming distributor and must obtain retransmission consent for any television broadcast station which it retransmits, subject to the exceptions enumerated in the statute. Where a SMATV, MATV, MMDS or other multichannel video service provider distributes broadcast signals along with any other video programming service offering which is available for purchase, the retransmission consent

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[54]S. Rep. No. 92, 102d Cong., 1st Sess. 34 (1991) ("Senate Report") (emphasis added).

provisions clearly require the consent of the broadcast stations involved.

The Commission has acknowledged that the term "multichannel video programming distributor" is used extensively throughout the statute.[55] However, the statute provides only a single definition of multichannel video programming distributor. The retransmission consent provisions of the statute do not provide any basis to impose a separate or different definition of multichannel video programming distributor for retransmission consent purposes than for the other statutory provisions. Indeed, in extending the Communications Act's equal employment opportunity provisions to all multichannel video programming distributors, the legislative history of the 1992 Cable Act makes clear that Congress considered SMATV systems to be multichannel video programming distributors. The House Report states that:

> Section 634(h)(1) is amended to extend the requirements of this section to not only cable and satellite master antenna television operators but to any multichannel video programming.[56]

This language indicates that Congress viewed both cable systems and SMATV systems to be included within the larger category of multichannel video programming distributors. Thus, it is clear

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[55]The NPRM acknowledges that the term "multichannel video programming distributor" is used in the sections of the 1992 Cable Act dealing with effective competition (Section 3), program access (Section 9), ownership (Section 11), program carriage agreements (Section 12) and equal employment opportunity (Section 22). NPRM at ¶42.

[56]House Report at 113 (emphasis added).

that the retransmission consent requirement was intended to apply to all multichannel video programming distributors.[57]

2. Compulsory License.

The Commission does not have the discretion to apply the retransmission consent provisions of the statute any differently depending on whether the entity involved is covered or not covered by the compulsory copyright licensing provisions of the Copyright Act. Not only is there no provision in the 1992 Cable Act which would authorize such differential treatment, but there is an express provision which bars such treatment. New Section 325(b)(6) of the Communications Act clearly states that:

> Nothing in this section shall be construed as modifying the compulsory copyright license established in section 111 of title 17, United States Code.

This provision makes absolutely clear that the retransmission consent requirements contained in Section 325(b) are meant to function entirely independently from copyright licensing issues. Thus, the Commission may not exclude MMDS from the definition of multichannel video programming distributor for purposes of the retransmission consent requirement merely because MMDS operators have been held not to qualify for the Section 111 compulsory copyright license. To the contrary,

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[57]The Commission has proposed to establish a new local multipoint distribution service in the 28 GHz frequency range which is intended, inter alia, for video use. See FCC News Report No. DC-2284 (December 10, 1992). Such new services, and any similar services to come, are clearly intended to be governed by Section 325(b).

MMDS operators are expressly included within the definition of multichannel video programming distributor to whom the retransmission consent provisions apply. Nor does the Commission have jurisdiction to claim that the grant of retransmission consent to an MMDS operator excuses it from having to obtain separate copyright licensing arrangements for the programming contained on the broadcast signal, since such an interpretation would constitute a modification of the compulsory copyright license by extending the license to cover wireless cable systems in violation of Copyright Office rulings.[58]

3. Applicability to Radio Stations.

The Commission also raises the question of whether retransmission consent applies only to television broadcast stations or whether the provision was intended to apply to radio stations as well. Although the Commission notes that the statutory language contained in Section 325(b)(1) is not expressly limited to television stations, both the structure of the 1992 Cable Act and the legislative history indicate that such a limitation was intended. In addition, Section 325(b)(3) is replete with references to television stations.

Section 2 of the 1992 Cable Act contains 21 findings by Congress which purport to underpin the adoption of the legislation. Of those 21 findings, 15 apply to the purported

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[58]Copyright Office Docket No. 86-7B, 57 Fed. Reg. 3284 (January 29, 1992).

justification for imposing mandatory carriage and retransmission consent requirements on cable television systems and other multichannel video programming distributors. The statute clearly indicates that, as to the cable operator, the mandatory carriage and retransmission consent provisions are intended to work in concert. Yet, only television stations are granted must-carry rights by the 1992 Cable Act. This is a persuasive indication that the retransmission consent provisions were also to apply only to television broadcasters. Indeed, subsection 19 of the Section 2 findings, dealing specifically with retransmission consent, clearly makes reference to <u>television</u> broadcasters as opposed to broadcasters generally. That subsection states in relevant part that:

> At the same time, broadcast programming that is carried remains the most popular programming on cable systems, and a substantial portion of the benefits for which consumers pay cable systems is derived <u>from carriage of the signals of network affiliates, independent television stations, and public television stations</u>. . . . Cable systems, therefore, obtain great benefit from local broadcast signals which, until now, they have been able to obtain without the consent of the broadcaster or any copyright liability.[59]

The legislative history of the 1992 Cable Act also makes clear that Congress intended the retransmission consent provisions to apply to television broadcasters only. Thus, the Senate Report on retransmission consent states that:

> The Committee has concluded that the exception to section 325 for cable retransmissions has created a

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[59]Pub.L. No. 102-385, 106 Stat. 1460, at §2(a)(9) (1992) (emphasis added).

> distortion in the video marketplace which threatens the future of over-the-air broadcasting.[60]

As further evidence of Congress' intent that the retransmission consent provisions apply only to the retransmission of television broadcast stations, the Conference Report states that:

> In the proceeding implementing retransmission consent, the conferees direct the Commission to consider the impact that the grant of retransmission consent by television stations may have on the rates for the basic service tier[.][61]

B. **Geographic Scope of Retransmission Consent.**

There are several issues which the Commission needs to address with respect to the geographic scope of retransmission consent. These issues deal with systemwide application of retransmission consent, dual ADI systems and the "same election" requirement.

1. Systemwide Application.

The Commission must acknowledge that a broadcast station's must-carry/retransmission consent rights must be asserted systemwide, and not on a community-by-community basis.[62] The express language of the 1992 Cable Act clearly indicates that the retransmission consent provisions were intended to apply

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[60]Senate Report at 35 (emphasis added).

[61]H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. 76 (1992) ("Conference Report") (emphasis added).

[62]The issue needs clarification because the Commission's 1972 must-carry rules applied on a community-by-community basis as do its present syndicated exclusivity, network non-duplication and sports blackout rules.

uniformly throughout a particular cable system. Section 325(b)(4) states:

> If an originating television station elects under paragraph (3)(B) to exercise its right to grant retransmission consent under this subsection with respect to a cable system, the provisions of section 614 shall not apply to the carriage of the signal of such station by such cable system. (emphasis added).

This language makes clear that a station must make its retransmission consent/must-carry election for each particular system and that a station is not free to assert must-carry rights as to particular communities served by a cable system and attempt to negotiate terms for retransmission consent with respect to the remaining communities served by the system.[63]

Application of the retransmission consent and must-carry provisions on a systemwide basis is required to effectuate Congress' mandate that basic rates be reasonable.[64] If broadcast stations were allowed to elect must-carry and retransmission consent on a community-by-community basis, this would greatly add to the cost of providing cable service by allowing television stations to assert must-carry rights in some or most of the communities served by the cable system, and then demand unreasonable retransmission consent payments as a condition of allowing carriage in the remaining communities.

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[63]Similarly, both the commercial and non-commercial must-carry provisions of the statute refer to the signal carriage requirements of "cable systems" and contemplate that broadcast signal carriage would be uniform systemwide. See, e.g., Sections 614(a), 615(b)(1).

[64]Pub.L. No. 102-385, 106 Stat. 1460, at §3 (1992), to be codified, in part, at 47 U.S.C. §543(b)(1).

Even where a cable operator is able to resist these demands, it would be forced to expend large sums of money to trap out signals in individual communities and possibly different sets of signals in different communities. In many instances, centralized trapping might not be feasible since a single trunk might serve several different communities and a station's election would not necessarily be the same throughout those communities. This problem is exacerbated by the trend over the last several years of clustering systems and dismantling unnecessary headends to achieve significant operational cost savings and economies of scale. To accommodate the must-carry and retransmission consent provisions on a community basis, cable operators could be forced to redesign their systems and reconstruct unnecessary headends which have been dismantled for economic reasons. Indeed, it is possible that such significant expenditures could be required every three years as stations change their must-carry/retransmission consent elections.

2. Dual ADI Systems.

Because the Commission's must-carry and retransmission consent rules are designed to apply uniformly on a systemwide basis, the Commission must make a special provision for technically integrated cable systems which serve communities located in more than one ADI. While these comments deal elsewhere with the unique must-carry problems of multiple ADI systems, special provisions must be made for such systems with respect to retransmission consent as well. For example, the

Commission's rules must provide that a station's must-carry election with respect to the local ADI portion of the cable system should automatically be deemed to grant retransmission consent as to any non-ADI communities served by the same system. Without such a provision, cable systems could be subjected to precisely the same problems and compliance costs as would be faced by systems generally if the Commission were to adopt a community based rather than systemwide standard for application of must-carry/retransmission consent.

C. **Implementation Procedures.**

The NPRM correctly notes that "[b]ecause commercial television stations are required to choose between retransmission consent and must-carry rights, the implementation of Section 325(b) and Section 614 must be addressed jointly."[65] Although the Commission does not anticipate delaying the effective date of the must-carry rules until the retransmission consent provisions become effective on October 6, 1993, the Commission does request comment on whether it would be appropriate to allow a sufficient amount of time for cable systems to come into compliance with the new must-carry rules.[66]

The Commission's rules must provide for a reasonable transition period to come into compliance with the must-carry and retransmission consent provisions of the 1992 Cable Act.

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[65]NPRM at ¶48.

[66]Id.

The implementation of both must-carry and retransmission consent could have a substantial disruptive impact on the channel lineups of a significant number of cable systems and on the established viewing patterns of cable subscribers. The potential disruption and dislocation caused by the new must-carry and retransmission consent provisions is exacerbated by the fact that the 1992 Cable Act uses entirely new criteria to define those stations which are considered local and thus are entitled to assert must-carry rights. Even cable systems which have continued to carry all local broadcast stations which were considered must-carry under prior FCC rules may be forced to restructure their channel lineup to accommodate new stations which are given must-carry rights for the first time and to negotiate the terms and conditions of retransmission consent to continue carriage of stations which have historically been considered local and to which subscribers have become accustomed.

With respect to retransmission consent stations, including those stations which are considered local under the statute as well as those stations which were considered local under the FCC's previous must-carry rules, cable operators find their signal carriage decisions increasingly complicated. For example, cable operators have never had to operate in an environment where carriage of a substantial portion of a cable operator's broadcast channel lineup could only be accomplished

with the consent of the stations.[67] Even under the FCC's former rules providing must-carry rights for local stations and limiting the carriage of distant signals, cable operators could determine the universe of potential stations which they would be entitled to carry based on objective criteria. Operators could reliably estimate the amount of channel capacity on their basic tier that would be needed for the carriage of local and distant stations even if the final decision had not been made as to which stations to carry.

Upon implementation of a must-carry/retransmission consent election for local stations and a retransmission consent requirement for most distant stations, such planning can no longer take place. It will no longer be possible for a cable operator to determine beforehand the number or nature of the broadcast stations which it will ultimately be permitted to carry since it is up to each individual station to grant or withhold permission for cable carriage on each particular system. A cable operator's decisions as to tier configuration, equipment and methods to implement tier security, pricing, the creation of marketing materials, and even the preparation of program guides for subscribers cannot take place until operators know what their signal carriage complement will be following negotiation of retransmission consent agreements. In

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[67]Indeed, the numerous difficulties in implementing retransmission consent led to the FCC abandoning its retransmission consent experiment when it adopted its 1972 Cable Rules. See Cable Television Report and Order, 36 FCC 2d 143 (1972).